

In: KSC-BC-2018-01
Specialist Prosecutor *v.* Isni Kilaj

Before: Single Judge Panel
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Duty Counsel for Isni Kilaj

Date: 29 April 2024

Language: English

Classification: Confidential

**Kilaj Request for Reclassification of Prosecution's Notice of
Intention to File an Amended Indictment (F00636)**

Specialist Prosecutor's Office
Kimberly P. West

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I. INTRODUCTION

1. On 15 December 2023, the SPO submitted an indictment for confirmation to the Single Judge.¹ This submission was made confidentially and *ex parte*. Rule 85(5) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chamber (“Rules”)² obliges the Single Judge to issue a decision on any request to confirm charges in an indictment no later than six months from the filing of the indictment and all supporting material.
2. On 15 March 2024, the Defence for Mr Kilaj (“Defence”) requested reclassification of F00549’s confidential status in order to make public the date on which the indictment in this case had been submitted for confirmation.³ As argued by the Defence, the “publicity of criminal proceedings is an important principle” guaranteed by the international human rights instruments⁴ which both bind the KSC and underpin its procedural framework.⁵ The right to public proceedings is enshrined in Article 21(2) of the Law. The Defence observed that “[b]oth the Single Judge and Court of Appeals Chamber have recalled the importance of filings being public unless there are exceptional reasons for keeping them confidential”.⁶

¹ This information was disclosed to the Defence in Prosecution response to Defence request F00548, KSC-BC-2018-01/F00549, 15 January 2024, confidential (“F00549”). The Single Judge ordered the reclassification of F00549 as public on 17 April 2024: Decision on Request for Reclassification and Lifting of Redaction, KSC-BC-2018-01/F00635 (“F00635”).

² Unless otherwise indicated, all references to “Rule(s)” are to the Rules.

³ Kilaj Request for Reclassification of Two Filings, and for Lesser Redacted Version of One Decision, KSC-BC-2018-01/F00620, 15 March 2024, confidential, (“F00620”). A corrected version was filed on 2 April 2024, F00620/COR. In F00635, the Single Judge ordered the reclassification of F00620 as public.

⁴ F00620, para. 5

⁵ Article 19(2) of the Law on Specialist Chambers and the Specialist Prosecutor’s Office, Law No. 5/L-053, (“Law”) guarantees that the Rules “shall reflect the highest standards of international human rights law including the ECHR and ICCPR”. Unless otherwise indicated, all references to “Article(s)” are to the Law.

⁶ F00620, para. 5, *citing* Decision on Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00547, 5 January 2024 (confidential), para. 71 (public redacted version notified on 18 January 2024); Decision on Isni Kilaj’s Appeal Against Decision on Continued Detention, KSC-BC-2018-01/IA004/F00006, 11 January 2024 (confidential), para. 9 (public redacted version also notified on 11 January 2024); Decision on

3. On 17 April 2024, in F00635, the Single Judge granted the Defence's application for reclassification. In so doing, the Single Judge considered the Defence submission that "there is a public interest in the question of whether an indictment has been submitted for confirmation".⁷ It is acknowledged that the lack of any objection to the reclassification of F00549 as public on the part of the SPO was a factor. Nevertheless, the Single Judge found – objectively and independently of the wishes expressed by the SPO – that the "filing [did not contain] sensitive information compromising the safety and security of witnesses, the privacy of Mr Kilaj or the security and integrity of proceedings".⁸
4. On 19 April 2024, the SPO filed (without leave) a notice of its intention to submit an amended indictment for confirmation to the Single Judge, relying upon Article 39 and Rule 90(1) ("Notice").⁹
5. The SPO has provided no indication of when it intends to file the amended indictment. Mr Kilaj, meanwhile, remains in custody.
6. In the event the Single Judge holds that the filing of the proposed amended indictment restarts the six-month period for consideration of the charges therein, this would have the effect of potentially extending the period of pre-indictment detention in a significant and unwarranted manner. This is not merely *pre-trial* detention, where an accused – benefitting from the presumption of innocence but at least knowing the charges he or she is facing – may be held in custody. This is *pre-indictment* detention, where Mr Kilaj is deprived of his liberty without a single charge formally levelled against him. Indeed, he is the first suspect before the KSC to be held in detention for more

Review of Detention of Isni Kilaj, KSC-BC-2018-01/F00603, 5 March 2024 (confidential), para. 57 (public redacted version also notified on 5 March 2024).

⁷ F00635, paras 11, 14 and 15.

⁸ *Ibid.*, para. 15.

⁹ Prosecution Notice, KSC-BC-2018-01/F00636, 19 April 2024, confidential, ("Notice").

than 42 days without seeing a confirmed indictment.¹⁰ As at the date of filing, Mr Kilaj has been in pre-indictment detention for an unprecedented 180 days.¹¹

7. In the absence of any objective and tenable justification for maintaining the confidentiality of the Notice, the Defence hereby requests that it be reclassified as public, pursuant to Rule 82(5), to enable the public ventilation of critical issues concerning this exceptional period of pre-indictment detention in accordance with Mr Kilaj's right to a public hearing, and to publicly correct the record concerning the status of the indictment.

II. SUBMISSIONS

- (i) *The Notice raises no issue concerning the "safety and security of witnesses [...] or the security and integrity of the proceedings"*

8. In F00635, the Single Judge found that F00549, disclosing the date on which the previously submitted indictment was filed, should be made public because, amongst other things, it "[contained no] sensitive information compromising the safety and security of witnesses, the privacy of Mr Kilaj or the security and integrity of the proceedings."¹² The Defence contends that the same conclusion must apply to the Notice because it too contains no sensitive or compromising information, and there are no other exceptional reasons for keeping it confidential.
9. The SPO avers that the Notice "cannot be made public at this time", given the "sensitive nature of the information contained herein and the potential serious

¹⁰ In the *Gucati & Haradinaj* case, the Single Judge took 42 days to decide on the confirmation of the indictment (between 30 October 2020 and 11 December 2020): *Prosecutor v. Hysni Gucati and Nasim Haradinaj*, Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, 11 December 2020, para. 1.

¹¹ Mr Kilaj was arrested on 2 November 2023.

¹² F00635, para. 15

impact its premature disclosure would have on its ongoing investigation”.¹³ However, it no provides no basis whatsoever for that assertion. Objectively, the Notice refers only to “recently discovered additional evidence”¹⁴ without disclosing (i) the nature of this evidence, (ii) when this evidence was discovered, (iii) where this evidence was discovered, or (iv) the source of this evidence. There is simply nothing identifying about the evidence, and therefore nothing that is in the slightest bit sensitive about the information in the Notice. The SPO would have the Defence accept, and the Single Judge determine, that Mr Kilaj’s right to be tried in public should be outweighed by virtue of an objectively baseless averment.

10. In any event, the SPO’s assertion bears little scrutiny. There is no basis to fear that notice of an intention to submit an amended version of an indictment, the existence of which is already in the public domain, has the potential to compromise an investigation. Nor are there other exceptional reasons for keeping it confidential.

(ii) *Delaying a decision on the confirmation of charges raises concerns over the lawfulness of Mr Kilaj’s pre-indictment detention which must be ventilated in public*

11. The lawfulness of this unprecedented period of pre-indictment detention, and the alarming prospect that it will be extended considerably further, must be determined not only against the background of Mr Kilaj’s presumption of innocence and right to liberty, but also within the ambit of his right to a public hearing.¹⁵

12. The Defence will contest the lawfulness of Mr Kilaj’s continued detention on the basis of the procedural history set out above in the event it is held that the

¹³ Notice, para. 3.

¹⁴ Notice, para. 1.

¹⁵ Article 21(2).

submission of an amended indictment restarts the time limit for a confirmation decision. The SPO offers nothing but the barest of explanations as to why an amended indictment is necessary, and therefore why – in theory – Mr Kilaj’s extraordinarily lengthy period of pre-indictment detention should be extended yet further (and beyond the presumptive six months provided for by the Rules).

13. These arguments will be developed in full as and when the issues ripen for challenge. For present purposes, it is submitted that it is precisely in situations such as this that the principle of publicity of proceedings must be preserved so that disputes over the lawfulness of exceptional conditions of detention can be ventilated in public.
14. The facts that no amended indictment appears to have been submitted yet, and, therefore, that the Single Judge is not yet in a position to set a target date for a confirmation decision, are no valid reason to prevent the reclassification of the Notice as public. Whilst the Notice does not state that an amended indictment has been filed, it does unquestionably alter the tenor of proceedings against Mr Kilaj. He has gone overnight from being a suspect facing an indictment in – presumably – an advanced stage of consideration by the Single Judge, to a suspect now awaiting an amended indictment at some unspecified future date, and the prospect thereafter of a further six months in custody without charges confirmed.

(iii) The public record will be inaccurate concerning a critical detail about the status of the indictment against Mr Kilaj unless the Notice is made public

15. By virtue of the Single Judge’s decision in F00635, and for well-founded reasons, the date on which the SPO submitted the initial indictment for confirmation is in the public record as being 15 December 2023. The Notice advises of the SPO’s intention to file an amended indictment and of its

position that “as such, there is no need for further consideration of the previously submitted indictment”.¹⁶

16. Objectively, this must amount to a withdrawal (without leave) of the “previously submitted indictment” pursuant to Rule 91(1).¹⁷ Taking the SPO at its word, whilst the amended indictment is awaited, there is no extant indictment in this case, confirmed or otherwise.
17. Unless the Notice is made public, the public record will reflect that the indictment of 15 December 2023 is still under consideration, and that, consequently, a decision on its confirmation will be delivered by 15 June 2024 at the latest. The confidential record currently contradicts the public record, with the potential to lead the public to erroneous conclusions on an issue which concerns the fairness of these proceedings, namely, the lawfulness and proportionality of Mr Kilaj’s continued pre-indictment detention.
18. Not only does this create an incoherent and inaccurate public record, Mr Kilaj is entitled to have these developments in the public domain. As the Defence argued in F00620, there is a public interest in the questions of whether an indictment has been submitted for confirmation or not, and when any confirmation decision might be delivered.¹⁸ The public interest in the question of whether the initially filed indictment has been, or will be, amended is indistinguishable. Further, the Defence reiterates its earlier point that the family of Mr Kilaj should be allowed to know that matters have evolved, that there is no now longer an indictment before the Single Judge for confirmation,

¹⁶ Notice, para. 1

¹⁷ Rules, Rule 91(1)

¹⁸ F00620, para. 6, referring to recent broadcasts by the Kosovan media outlet *Radio Televizioni Dukagjini*:
https://youtu.be/jCEzuv9l138?si=q_ZvWO8KNngnmI37A,
<https://youtu.be/ufgxNKidA8A?si=p55qkHTK2APtHkzq>

and that this “impacts the timeline of proceedings”.¹⁹ As before, Counsel is unable to even mention these facts to Mr Kilaj’s wife and children.²⁰

19. For these reasons, and given that the SPO advances no tenable justification to maintain the confidentiality of the Notice, the public record should be corrected to reflect the true position concerning the status of the indictment.

(iv) *Any further developments in this case concerning the status of the amended indictment should be inter partes*

20. There is now, of course, no basis for the presumptive *ex parte* classification, provided for by Rule 86(2), to be maintained for any filings concerning the status of the submission of the amended indictment (as distinct, perhaps, from the *contents* of the amended indictment). The SPO appears to agree, having filed the Notice *inter partes*. The progress of the preparation and filing of the amended indictment is of critical concern to Mr Kilaj’s right to liberty, and therefore the Defence must be furnished with all relevant details in order to enable it to safeguard his rights. The Defence therefore requests the Single Judge to order that the SPO file future submissions or requests or observations relating to the status of the amended indictment on an *inter partes* basis.

21. Further, the Defence, recalling that the setting of a target date for the delivery of a confirmation decision pursuant to Article 39(2) is a mandatory function of the Single Judge under Rule 85(5), respectfully requests that the Single Judge set a date as a matter of urgency, and that this target date be communicated in an *inter partes* filing.

¹⁹ Notice, para. 2.

²⁰ F00620, para. 6.

22. Whether or not any such filings should be classified as confidential, and thereby withheld from the public, should be justified against the appropriate criteria, referred to above, and not merely asserted.

III. CLASSIFICATION

23. The instant request is classified as confidential solely because it relates to a confidential document, the Notice, in accordance with Rule 82(4). However, in the event this request is granted, the basis for its confidentiality would dissipate. In those circumstances, this request and any filings relating thereto should be reclassified as public.

IV. REMEDY

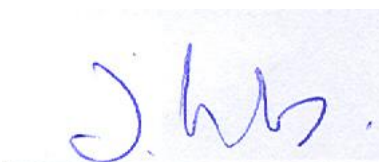
24. For the foregoing reasons, the Single Judge is respectfully requested to:

- (i) ORDER the reclassification of the Notice as public;
- (ii) ORDER that future submissions or requests or observations concerning the status of the amended indictment be filed *inter partes*;
- (iii) SET a target date for the delivery of a confirmation decision as a matter of urgency; and
- (iv) ORDER the reclassification of this request as public.

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The Hague, The Netherlands